88-1252

No. 88-

Supreme Court, U.S.
FILED
JAN 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SCHNEJER Z. GURARY, NOCHUM STERNBERG, and ESTHER STERNBERG,
Petitioners,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether a conviction for aiding and abetting tax fraud may stand in the absence of evidence that the defendant knew or contemplated any violation of the tax laws.

2. Whether intent to violate the tax laws may be inferred from a "conscious avoidance" of the consequences of a defendant's conduct.

3. Whether the Speedy Trial Act is satisfied by an unexplained conclusory extension of time to return an indictment.

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OPINIONS BELOW

The decision of the court of appeals is reported at 860 F.2d 521. It appears as Appendix I, pp. 1a-16a, *infra.*

JURISDICTION

The opinion of the court of appeals was filed on October 24, 1988. The petitioners filed timely petitions for rehearing and for rehearing *in banc.* The Sternbergs' petition for rehearing was denied on November 18, 1988. Appendix II, p. 17a, *infra.* The petition of all petitioners for rehearing and rehearing *in banc* was denied on November 30, 1988. Appendix III, p. 18a, *infra.*

STATEMENT

1. *Petitioners' Knowledge and Intent*

Petitioners were convicted, after a trial by jury, on one count of conspiracy (18 U.S.C. § 371) and 44 counts of aiding and abetting the filing of false corporate and personal income tax returns (26 U.S.C. § 7206(2)). It was undisputed that petitioners provided cash and invoices falsely reflecting sales of merchandise to various business concerns in New York City. The corporations—largely in the garment trade—reported the transactions as purchases and thereby falsely reduced their taxable income. Corporate officers also used some or all of the cash for personal purposes and did not report the amounts so taken on their personal tax returns. The only factual issue at trial was petitioners' intent and their knowledge of the corporate and personal tax fraud.

There was no evidence that any of the corporate officials had discussed taxes with petitioners or had advised them that they would treat the transactions as the basis for an expense deduction. And it was undisputed that petitioners did not participate in any way in the preparation of the corporate or personal tax returns. Nor did petitioners know or have any reason to know that the corporate officers were using the cash for personal, rather than business, purposes.

There was substantial evidence in the record that cash is highly useful in the garment trade for various purposes, and some of the prosecution's witnesses testified that they had used cash received from petitioners to buy machinery at low prices (J.A. 254),[1] to purchase inventory (J.A. 268-72, 307, 469), and to pay employees (J.A. 278, 341-44, 415-16, 427-29, 524, 534-42). Cash was also used to make under-the-table payments for desirable products (J.A. 273-74, 442) and to entertain or pay off buyers (J.A. 360, 415-16, 561).

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[1] "J.A." refers to the Joint Appendix filed in the court of appeals.

With regard to the false invoices, witnesses testified that invoices were needed, under standard corporate office procedures, to generate the checks that were cashed (J.A. 425-26, 443-45, 503). Some witnesses said that they wanted invoices so that their use of cash would not be obvious to office employees (J.A. 263, 468, 519-21, 538-40). It was stipulated that the accountants who prepared the corporate and individual tax returns did not examine any of the false invoices (J.A. 287-91, 328-29, 396-97, 562).

The only reference to taxes made in the presence of any of the petitioners was the alleged statement of one "middleman" who reported that petitioner Gurary had said to him (J.A. 468):

> that if you buy piece goods, you can save money on taxes by building up the inventory, or you can buy piece goods and get the dollar amount back and use it either to pay off buyers or expand your business or keep it personally.[2]

Petitioners' defense at their trial was that there was no proof to connect them to tax fraud since they did not participate in the preparation of tax returns, had never discussed taxes with the taxpayers, and had never suggested that the transactions with them be used as a basis for claiming any tax benefit. To support their theory of defense, petitioners elicited testimony from prosecution witnesses showing that cash and false invoices have many purposes, lawful as well as unlawful, that are unrelated to tax evasion. The witnesses' answers demonstrated that petitioners had no reason to know of the unlawful tax purposes to which their services were being put.

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[2] This full quotation was taken out of context in the decision of the court of appeals, where it is quoted as if the statement that "you can save money on taxes" was stated in direct response to the question as to why one might want false invoices (*see* Appendix I, p. 5a, *infra*).

In view of petitioners' theory of defense, the jury instructions on the elements of knowledge and intent were crucial. At the request of the prosecutor and over repeated objections by defense counsel (Tr. 3011-3012, 3100-3101, 3516-3520, 3526, 3528, 3531-3532, 3621),[3] the district judge gave lengthy instructions regarding the "conscious avoidance of knowledge," pursuant to which the petitioners could be found guilty without any direct proof that they knew of, or participated in, tax fraud. In the portion of the charge concerning the conspiracy count, the court charged (Appendix VII, pp. 29a-30a, *infra*):

> Also on the issue of the defendants' knowledge as to whether the invoices and cash would be used to defraud the IRS or accomplish the other tax objects of the conspiracy, I instruct you that you may consider whether a defendant deliberately closed his or her eyes to what otherwise would have been obvious. Guilty knowledge of the unlawful nature of the conspiracy—if you find one to have existed—cannot be established by demonstrating mere negligence or even foolishness or recklessness on the part of the defendant.
>
> However, it is not necessary that the Government prove that a defendant knew any given fact or facts such as the details of a particular false filing or particular aspects of the tax laws.
>
> Rather, you may find that a defendant knew the purpose of the invoice and cash selling operation was to defraud IRS, or evade taxes, or file false returns, or aid and assist the filing of false tax returns if you find that
>
> 1. the defendant you are considering was aware of a high probability that the false invoices or cash would be used for one or more of these. unlawful purposes, and

[3] "Tr." refers to the transcript of the trial of this case.

> 2. that defendant acted with deliberate disregard of how the invoices or the cash would be used, with a conscious purpose to avoid learning the truth on this subject.
>
> Conscious avoidance may satisfy the requirement of willfulness, unless you find that the defendant you are considering actually believed that the invoices and cash would not be used to defraud the IRS or to violate the tax laws to which I have referred.

In the portion of the charge concerning the substantive counts, the judge gave yet another instruction concerning the "conscious avoidance'" of knowledge (Appendix VIII, p. 31a, *infra*):

> On the issue of defendants' knowledge and intent on the 44 substantive counts, I instruct you again that you may consider whether a defendant deliberately closed his or her eyes to what otherwise would have been obvious. Guilty knowledge of the use to which invoices and the cash would be put cannot be established by demonstrating recklessness, mere negligence or even foolishness on the part of a defendant. However, it is not necessary that the Government prove that a defendant knew any given fact or detail of the false filing, or particular aspects of the law about aiding or assisting the filing of a false return.
>
> Rather you may find that a defendant knew that the invoices and/or cash would be used to prepare or file false corporate and/or individual tax returns if you find that (1) the defendant you are considering was aware of a high probability that the false invoices or the cash would be used to prepare or file false tax returns, and (2) that defendant acted with deliberate disregard for how the invoices or the cash would be used, with a conscious purpose to avoid learning the truth on this subject. Conscious avoidance may satisfy the requirement of willfulness, unless you find that the defendant you are considering

actually believed that the invoices and cash would not be used to prepare or file false tax returns.

The court of appeals rejected petitioners' contention that it was improper to give the "conscious avoidance" instruction in the absence of any evidence that petitioners had deliberately avoided learning the truth.

2. *Speedy Trial*

Another important issue considered and rejected by the court of appeals concerns the government's failure to comply with the Speedy Trial Act. 18 U.S.C. §§ 3161 *et seq.* Petitioners Gurary and Nochum Sternberg were arrested on April 2, 1986, on their voluntary surrender, pursuant to a complaint charging them with conspiring to violate the federal tax laws (J.A. 50-57). The complaint described the same scheme later specified in the indictment, whereby petitioners were alleged to have aided and assisted principals in the New York City garment industry in filing false corporate and personal income tax returns.

At petitioners' arraignment on these charges, the magistrate set April 22, 1986, as the date for a preliminary examination. The Speedy Trial Act, 18 U.S.C. § 3161(b), required that an indictment be filed by May 2, 1986.

On April 17, 1986, having failed to obtain petitioners' consent to an extension of time either under the Speedy Trial Act or under Rule 5 of the Federal Rules of Criminal Procedure, the prosecutor submitted an application to District Judge Kevin Duffy for an order continuing the time for returning an indictment and for holding a preliminary hearing for an additional 60 days (J.A. 58-65). Petitioners opposed the prosecutor's request, arguing, among other things, that the circumstances provided no basis for a delay (J.A. 66-75; 78-83).

Following a hearing on April 18, 1986, Judge Duffy granted the requested continuance. The judge gave the

following explanation for granting the prosecutor's request (Appendix IV, p. 24a, *infra*):

> The fact of the matter is, does he get the extension, and the answer is yes.
>
> I am telling you right now, to the best of my knowledge and belief it doesn't hurt you unless your clients like to see their names in print, which you are suggesting.
>
> The other way is a double batch of publicity.
>
> I don't care about it. I'm not much for publicity, and I drive the people at St. Andrew's Plaza crazy, because I do all kinds of things that they get very annoyed about, but this is one time when I'm going to hold because I think whether it is intentional or not it works out to be fair for the defendants, and under those circumstances I can't say no.

Judge Duffy also entered a *pro forma* order, which recited (Appendix V, pp. 25a-26a, *infra*):

> It is further found that granting of such a continuance best serves the ends of justice and outweighs the best interests of the public and the defendant in a speedy trial; . . . .

On June 18, 1986, an indictment was returned, charging defendants with, among other offenses, conspiring to defraud the United States and aiding and assisting the filing of false corporate and personal income tax returns.[4] Petitioners moved to dismiss the indictment and argued that six counts were subject to dismissal because filed in violation of the Speedy Trial Act. In particular, petitioners contended that the ends-of-justice continuance was not an excludable period of delay under the Speedy Trial

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[4] Petitioners appealed Judge Duffy's grant of a continuance, but their appeal was dismissed as premature. *United States v. Gurary*, 793 F.2d 468 (2d Cir. 1986).

Act because the district judge never had placed in the record particular reasons that supported the continuance, as is required by 18 U.S.C. § 3161(h)(8)(A).

On April 7, 1987—almost three months after petitioners' motion was filed—the prosecutor sent to Judge Duffy a proposed order that quoted some of the language set forth in the Speedy Trial Act, 18 U.S.C. § 3161(h)(8)(B), and requested that the order be entered to support the continuance that had been granted nearly one year earlier. On April 14, 1987, Judge Duffy signed the proposed order without modification (Appendix VI, pp. 27a-28a, *infra*). The order recited the following reasons to justify the continuance:

> (a) delay in the filing of the Indictment was caused because the arrest of the defendants occurred at a time such that it was unreasonable to expect return and filing of the Indictment within the period specified in 18 U.S.C. § 3161(b);
>
> (b) the facts upon which the grand jury was required to base its determination were unusual and complex; and
>
> (c) the reasons set forth in the sealed affidavit and sealed *ex parte* affidavit of Assistant United States Attorney Paul E. Summit, dated April 17, 1987 [sic].

Thereafter, the district judge before whom the indictment was pending denied petitioners' motion to dismiss the indictment without opinion. The court of appeals affirmed without considering the inadequacy of Judge Duffy's initial order. The court stated, in conclusory fashion, that the post-indictment recital one year later was "sufficiently particularized" (Appendix I, p. 15a, *infra*).

REASONS FOR GRANTING THE WRIT

I. Conviction of Petitioners for Tax Offenses Without Proof That They Intended to Violate the Tax Laws Conflicts With Decisions of this Court.

This case parallels the facts of this Court's unanimous ruling in *Ingram v. United States*, 360 U.S. 672 (1959), and is governed, as well, by this Court's decision in *United States v. Falcone*, 311 U.S. 205 (1940). As was true in both *Ingram* and *Falcone*, petitioners engaged in surreptitious activity that was illicit and that they sought to conceal. In both *Ingram* and *Falcone*, the dispositive question was whether the defendants were participants in conspiracies to violate the tax or revenue laws merely because they knew that illegal activity was occurring and their conduct aided the illegal venture. In both cases, the Court held that such knowledge was insufficient to convict the defendants of tax violations.

In *Ingram*, the Court held that the proprietors of a large lottery—who were themselves liable for the wagering taxes—could be convicted for defeating or evading the tax.[5] However, others who assisted the gambling enterprise could not be found guilty of participating in a conspiracy to violate the tax laws. The Court's reasoning applies equally to the petitioners in this case. Here, as in *Ingram*, "[i]t was not shown . . . that any reference had ever been made by any of the petitioners to possible tax liability" (360 U.S. at 678), and "the secrecy of the operation" did not prove knowledge of any potential tax violation (360 U.S. at 679). Just as the lottery in *Ingram* was criminal under local law, the transfer of large amounts of cash—which created possible liability under the currency laws—explained the secrecy of petitioners' operation. There was, in this case, no evidence whatsoever that petitioners knew of the corporate or in-

[5] Even as to the proprietors, Justices Harlan, Douglas, and Brennan dissented. 360 U.S. at 681-83.

dividual tax frauds, participated in them in any way, or benefited in any manner by the tax violations. Thus, the governing principle here is the principle articulated by this Court in *Falcone*, 311 U.S. at 210-11:

> [O]ne who without more furnishes supplies to an illicit distiller is not guilty of conspiracy even though his sale may have furthered the object of a conspiracy to which the distiller was a party but of which the supplier had no knowledge.

The corporations and individuals who filed false tax returns in this case were assisted in their illegal activities by the actions of the petitioners. But the petitioners, like the distiller's suppliers in *Falcone* and the lottery's employees in *Ingram* did not know of, or participate in, the tax conspiracy and tax offenses committed by the principals.

The contrary proposition applied here by the Court of Appeals for the Second Circuit extends the criminal tax laws far beyond their intended scope. Under the court of appeals' holding, every person who supplies cash to a tax evader may now be found guilty of conspiracy to commit tax evasion or aiding and abetting tax evasion even though there is no proof that he knew how the recipient would reflect the cash on his tax returns. To our knowledge, this is the first reported case that has extended the reach of 26 U.S.C. § 7206(2) beyond individuals who participate in the preparation of a tax return or provide documents explicitly designed for use in connection with a tax return.[6]

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[6] The government has proceeded successfully under Section 7206(2) against operators of tax service firms and others who prepare false returns for clients. *See United States v. Gleason*, 766 F.2d 1239 (8th Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986); *United States v. Erickson*, 676 F.2d 408 (10th Cir.), *cert. denied*, 459 U.S. 853 (1982); *United States v. Conlin*, 551 F.2d 534 (2d Cir.), *cert. denied*, 434 U.S. 831 (1977); *United States v. Miller*, 529 F.2d 1125 (9th Cir.), *cert. denied*, 426 U.S. 942 (1976);

Edwards v. United States, 375 F.2d 862 (9th Cir. 1967); *Hull v. United States*, 356 F.2d 919 (5th Cir. 1966). The government has secured similar convictions of persons who market tax shelters and provide investors with false information for their tax returns. *See United States v. Crooks*, 804 F.2d 1441 (9th Cir. 1986); *United States v. Skulsky*, 786 F.2d 558 (3d Cir. 1986); *United States v. Barshov*, 733 F.2d 842 (11th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985); *United States v. Clardy*, 612 F.2d 1139 (9th Cir. 1980); *United States v. Crum*, 529 F.2d 1380 (9th Cir. 1976). Section 7206(2) has been used to convict employers who failed properly to withhold taxes from their employees' wages and provided the employees with false forms for use in connection with the employees' tax returns. *See United States v. Mackenzie*, 777 F.2d 811 (2d Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); *United States v. Isaksson*, 744 F.2d 574 (7th Cir. 1984); *see also United States v. Fox*, 613 F.2d 99 (5th Cir. 1980). The government also has relied on Section 7206(2) to convict persons who assert, on various constitutional and statutory theories, that the tax laws are unlawful and teach others to implement those theories in filing their tax returns. *See United States v. Graham*, 758 F.2d 879 (3d Cir.), *cert. denied*, 474 U.S. 901 (1985); *United States v. Condo*, 741 F.2d 238 (9th Cir. 1984), *cert. denied*, 469 U.S. 1164 (1985); *United States v. Buttorff*, 572 F.2d 619 (8th Cir.), *cert. denied*, 437 U.S. 906 (1978).

Section 7206(2) has also been used to prosecute persons who form purported tax-exempt churches and encourage others to buy ministries in the churches so that the others may claim that they are subject to no or reduced tax liability. *See United States v. Heinemann*, 801 F.2d 86 (2d Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987); *United States v. Gleason*, 766 F.2d 1239 (8th Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986). The application of Section 7206(2) has been sustained in cases where a gambler has concealed his winnings from the Internal Revenue Service by enlisting another to cash his winning ticket for him. *See United States v. Maistrow*, 451 F.2d 1342 (2d Cir. 1971); *United States v. Kessler*, 449 F.2d 1315 (2d Cir. 1971); *United States v. Haimowitz*, 404 F.2d 38 (2d Cir. 1968). In other cases where the government has obtained convictions for violating Section 7206(2), the accused provided false and fraudulent information to the preparer of the tax return, *see United States v. Moon*, 718 F.2d 1210 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984); *see also United States v. Scharrer*, 614 F. Supp. 234 (S.D. Fla. 1985); gave advice concerning the false tax treatment of certain payments, *see United States v. Rubin*, 844 F.2d 979 (2d Cir. 1988); *United States v. Rauhoff*, 525 F.2d 1170 (7th Cir. 1975); or participated in the preparation of the false return, *see United States v. Greer*, 607 F.2d 1251 (9th Cir.), *cert. denied*, 444 U.S. 993 (1979).

The Court of Appeals for the Fifth Circuit has reached a contrary result in a case involving transactions identical to those engaged in by petitioners. *United States v. Williams*, 809 F.2d 1072 (5th Cir.), *cert. denied*, 108 S. Ct. 228 (1987). In the *Williams* case, a middleman arranged for the defendant to provide a false labor contract and $20,000 in cash in exchange for a corporate check, with the middleman taking ten percent of the cash as his fee. 809 F.2d at 1095 & n.24. The middleman knew that the recipient of the cash and the invoice intended to file a tax return reflecting the false labor payment, but there was no evidence that the defendant "knew of the tax fraud scheme." 809 F.2d at 1095. The court particularly noted that the defendant was not present at any conversations concerning the tax scheme and that the testimony established that the main purpose of the transaction was to launder drug money. *Id.* Because no proof supported an inference that the defendant "knowingly made the exchange with the expectation" that the invoice would be used to file a false tax return, the evidence was held insufficient to support the conviction for conspiracy to make false returns and for aiding and abetting the preparation of a false return.

A petition for certiorari recently filed by the Solicitor General, *United States v. Still*, No. 88-581 (filed Oct. 4, 1988), raises a similar question of how far federal criminal liability may be extended. In that case, the Court of Appeals for the Ninth Circuit rejected the government's effort to punish certain acts of preparation as a criminal attempt because it found that such a result would extend criminal liability beyond the settled and only understandable bases for criminalizing attempts. Here, on the other hand, the court of appeals' decision extends liability for violation of the tax laws far beyond the boundaries that this Court has so carefully erected.

This Court should grant certiorari and review this case to limit Section 7206(2) to its intended reach and

not extend it to individuals who play no direct role in, and are not shown to have any knowledge of, the tax evasion of others.

II. By Permitting an Instruction on "Conscious Avoidance" to Substitute for Actual Proof of Knowledge and Intent, the Second Circuit's Decision Conflicts With Rulings of Other Circuits.

Since there was no proof that petitioners knew of their customers' tax fraud, the jury's finding of guilt must have rested on the proposition that petitioners "consciously avoided" learning what their customers would do with their tax returns. Over petitioners' objections, the trial court gave a "conscious avoidance" charge that allowed the jury to find the petitioners guilty if there was a "high probability" that false invoices or cash would be used for tax evasion and the petitioners "deliberately" disregarded how the invoices or cash would be used. This instruction conflicted squarely with established law, including the views of the draftsmen of the Model Penal Code, who have warned that a "conscious avoidance" charge should never be given "when what is involved is the result of the defendant's conduct, necessarily a matter of the future at the time of acting." Model Penal Code, § 2.02 comment 9 (1985).[7]

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[7] Courts have approved "conscious avoidance" charges when the evidence shows that the accused deliberately avoided knowledge of an *existing fact*, as opposed to the future consequence of his actions. A conscious avoidance theory is frequently used to establish that a person accused of a narcotics crime had knowledge of the nature of the substance that he handles. *United States v. DiTommaso*, 817 F.2d 201 (2d Cir. 1987); *United States v. Aulet*, 618 F.2d 182 (2d Cir. 1980); *United States v. Olivares-Vega*, 495 F.2d 827 (2d Cir.), *cert. denied*, 419 U.S. 1020 (1974); *United States v. Joly*, 493 F.2d 672 (2d Cir. 1974); *see United States v. Alvarado*, 817 F.2d 580 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 2880 (1988). The "conscious avoidance" instruction has been held proper in cases where the accused has denied knowing that goods in his possession were stolen. *United States v. Joyce*, 542 F.2d 158 (2d Cir. 1976) (per curiam), *cert. denied sub nom. Teri v. United States*, 429 U.S. 1100 (1977); *United States v. Brawer*, 482 F.2d 117 (2d

The conscious avoidance charge given in this case did not concern an existing fact. Rather, it concerned only the future consequences of petitioners' conduct in providing cash and invoices to the corporate principals. In particular, the district court charged that, "on the issue of the defendants' knowledge as to whether the invoices and cash *would be used* to defraud the IRS or accomplish the other tax objects of the conspiracy, . . . you may consider whether a defendant deliberately closed his or her eyes to what otherwise would have been obvious" (Appendix VII, p. 29a, *infra* (emphasis added)). The court further instructed that the jurors should consider whether the "defendant . . . was aware of a high probability that the false invoices or cash *would be used* for one or more of these unlawful purposes" and whether the "defendant acted with deliberate disregard of how the invoices or the cash *would be used*" (*id.*, pp. 29a, 30a (emphasis added)). Similarly, the district court charged, "Conscious avoidance may satisfy the requirement of willfulness, unless you find that the defendant . . . actually believed that the invoices and cash *would not be used* to defraud the IRS or to violate the tax laws." *Id.*, p. 30a (emphasis added); *see* Appendix VIII, p. 31a, *infra*.

Cir. 1973), *cert. denied*, 419 U.S. 1051 (1974); *United States v. Jacobs*, 475 F.2d 270 (2d Cir.), *cert. denied sub nom. Lavelle v. United States*, 414 U.S. 821 (1973). Similarly, the charge has been approved where a person accused of making false statements has denied knowing that the statements were false. *United States v. Hanlon*, 548 F.2d 1096 (2d Cir. 1977); *United States v. Natelli*, 527 F.2d 311 (2d Cir. 1975), *cert. denied*, 425 U.S. 934 (1976); *United States v. Sarantos*, 455 F.2d 877 (2d Cir. 1972); *United States v. Egenberg*, 441 F.2d 441 (2d Cir.), *cert. denied*, 404 U.S. 994 (1971); *see United States v. Thomas*, 484 F.2d 909 (6th Cir.), *cert. denied*, 414 U.S. 912 (1973); *see also United States v. Abrams*, 427 F.2d 86 (2d Cir.), *cert. denied*, 400 U.S. 832 (1970). The charge has been upheld where a defendant accused of attempted extortion denied knowing that his employees had threatened a business rival (*United States v. Ciambrone*, 787 F.2d 799 (2d Cir.), *cert. denied*, 479 U.S. 1017 (1986)), and where a defendant claimed he was unaware that he was transporting illegal aliens (*United States v. McAllister*, 747 F.2d 1273 (9th Cir. 1984), *cert. denied*, 474 U.S. 829 (1985)).

This charge invited the jurors to convict on the improper speculation that petitioners should have known that their conduct was likely to result in illegal activity by another. Petitioners were, in effect, convicted for negligently failing to anticipate the consequences of their activity.

Nor was there any evidence that petitioners deliberately avoided learning how their customers treated the transactions in their tax returns. Many circuits have recognized that trial judges may not give a "conscious avoidance" instruction in the absence of direct proof that the defendants deliberately avoided learning the truth. *See, e.g., United States v. Murrieta-Bejarano*, 552 F.2d 1323, 1325 (9th Cir. 1977). In the Ninth Circuit, a conscious avoidance charge may be used "only in those comparatively rare cases where, in addition, there are facts that point in the direction of deliberate ignorance." *Id.; see also United States v. Peddle*, 821 F.2d 1521, 1524 (11th Cir. 1987); *United States v. Knight*, 705 F.2d 432, 434 (11th Cir. 1983); *United States v. Batencort*, 592 F.2d 916, 918 (5th Cir. 1979); *see also United States v. Perez-Pedilla*, 846 F.2d 1182, 1183 (9th Cir. 1988) (*per curiam*); *United States v. Alvarado*, 838 F.2d 311, 314 (9th Cir.), *cert. denied*, 108 S. Ct. 2280 (1988); *United States v. McAllister*, 747 F.2d 1273, 1275 (9th Cir. 1984), *cert. denied*, 474 U.S. 829 (1985); *United States v. Ciampaglia*, 628 F.2d 632, 642 (1st Cir.), *cert. denied*, 449 U.S. 956 (1980). The threshold of proof for giving a conscious avoidance instruction is clear: "The facts must support the inference that the defendant was: 1) aware of a high probability of the existence of the fact in question, *and* 2) purposely contrived to avoid learning all of the facts in order to have a defense in the event of a subsequent prosecution." *United States v. Alvarado, supra*, 838 F.2d at 314.

No evidence warranted an inference that petitioners had "purposely contrived to avoid learning all the facts,"

as is required by the Ninth Circuit's evidentiary standard.[8] The government presented no evidence in this case on which the jurors could base a finding that petitioners had deliberately shut their eyes to the activities of their customers. The "conscious avoidance" charge created a significant risk that the jurors convicted petitioners based on sheer conjecture as to their state of mind.

Because the court of appeals' decision in this case directly conflicts with a standard that is well-settled in the Ninth Circuit and has been approved by other circuits, this Court should grant a writ of certiorari and reverse the decision of the court of appeals.

III. The Decision of the Court of Appeals Eradicates an Important Provision of the Speedy Trial Act.

The language of the Speedy Trial Act is clear. No ends-of-justice continuance shall be excluded in computing the time within which an indictment must be filed "unless the court sets forth, in the record of the case, . . . its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(8)(A). On its face, the law invalidates routine or boilerplate extensions of the indictment deadline.

The legislative policy supporting Section 3161(h)(8)(A) is also clear. Congress intended that the ends-of-justice exclusion "be 'rarely used.'" *United States v.*

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[8] This is not a case where the accused got up and left a discussion among his co-conspirators about the illegal use of facilities he had provided "with the remark that he didn't want to hear about it." *United States v. Kehm*, 799 F.2d 354, 362 (7th Cir. 1986). Nor is this a case in which the accused deliberately ignored activities in her place of business and responded to warnings that the activities were criminal by saying "that she did not want to hear about it." *United States v. Gold*, 743 F.2d 800, 823 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 1196 (1985); *see also United States v. Mohabir*, 624 F.2d 1140, 1142-43 (2d Cir. 1980).

Nance, 666 F.2d 353, 355 (9th Cir.) (quoting S. Rep. No. 1021, 93d Cong., 2d Sess. 21 (1974)), *cert. denied*, 456 U.S. 918 (1982). To ensure that the exclusion was invoked only in appropriate cases, Congress directed district judges to consider enumerated "factors" in deciding whether or not to grant a continuance, and it prohibited district judges from relying on other "factors." 18 U.S.C. §§ 3161(h)(8)(B); 3161(h)(8)(C). To ensure that the ends-of-justice exclusion is not abused, Congress ordered that, before a continuance may toll the speedy trial clock, "*the court must set forth with particularity reasons* for granting" the continuance. H.R. Rep. No. 1508, 93d Cong., 2d Sess., *reprinted* in 1974 U.S. Code Cong. & Ad. News 7401, 7426 (emphasis added); *see* 18 U.S.C. § 3161(h)(8)(A). This requirement prevents routine invocation of the ends-of-justice exclusion by ensuring that district courts carefully consider the particular facts of the case before them before extending a Speedy Trial deadline. *See United States v. Perez-Reveles*, 715 F.2d 1348, 1351 (9th Cir. 1983).

In this case, the court of appeals upheld a continuance that was granted in the absence of any particularized findings by the district judge. When he granted the continuance, the district judge noted only that he could not see how a continuance would "hurt" petitioners (Appendix IV, p. 24a, *infra*), and his order recited nothing more than a conclusion that the continuance served the ends of justice (Appendix V, pp. 25a-26a, *infra*). Nearly a year later, the judge signed another order, which had been drafted by the prosecutor, purporting to make "findings of fact" to support the continuance. These "findings of fact" merely tracked some of the statutory language, without identifying a single fact from this case that justified the delay (*see* Appendix VI, pp. 27a-28a, *infra*).[9] The Court of Appeals for the Ninth Circuit

[9] "Finding of fact" (a) did no more than quote some of the language of Section 3161(h)(8)(B)(iii), without any reference to the

has announced a rule that is designed strictly to enforce the Act's requirement of particularized findings. Thus, in *United States v. Perez-Reveles*, 715 F.2d 1348 (9th Cir. 1983), the court reversed a conviction and remanded with directions to dismiss the indictment because the district court had relied on the ends-of-justice exclusion without making the "explicit findings" called for by Section 3161(h)(8)(A). The court held that the continuance was not an excludable period of delay, and the accused had therefore been tried beyond the Speedy Trial Act deadline. *See also United States v. Bryant*, 726 F.2d 510 (9th Cir. 1984) (*per curiam*). Decisions by the Court of Appeals for the Third Circuit, *see United States v. Brooks*, 697 F.2d 517, 520-21 (3d Cir. 1982), *cert. denied*, 460 U.S. 1071 (1983), and by the Court of Appeals for the Seventh Circuit, *see United States v. Wiehoff*, 748 F.2d 1158 (7th Cir. 1984), also make clear that a continuance will not be an excludable delay unless the trial judge articulates case-specific reasons that support it.

The Speedy Trial Act and its legislative history, as well as the Ninth Circuit's holdings enforcing it, expressly direct district judges to explain with particularity why an ends-of-justice continuance should be granted. Because the court of appeals is ignoring Congress' command, this Court should grant certiorari and reverse the decision below.

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circumstances of the arrest in this case. Similarly, "finding of fact" (b) quoted two words from Section 3161(h)(8)(B)(ii), namely, that the facts were "unusual" and "complex." "Finding of fact" (c) is even more flawed since it purports to satisfy the *district court's* obligation to articulate the particular reasons justifying delay by reference to "reasons" set forth in the *prosecutor's* submissions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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JANUARY 1989

APPENDICES

APPENDIX I

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Nos. 90, 100, 101, Dockets 88-1114, 88-1115, 88-1121

UNITED STATES OF AMERICA,
Appellee,

v.

SCHNEJER ZALMAN GURARY, NOCHUM STERNBERG and ESTHER STERNBERG,
Defendants-Appellants.

Argued Sept. 7, 1988

Decided Oct. 24, 1988

Before KEARSE, VAN GRAAFEILAND, C.J.J., and POLLACK, District Judge.*

POLLACK, District Judge:

Defendants Schnejer Zalman Gurary, Nochum Sternberg and Esther Sternberg appeal from judgments of conviction on 45 counts of conspiracy and aiding and assisting the filing of false corporate and individual tax returns. Convictions were entered on March 9, 1988 after a jury trial before the Honorable John M. Walker, United States District Judge for the Southern District of New York.

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* Honorable Milton Pollack, Senior United States District Judge for the Southern District of New York, sitting by designation.

Defendants appeal their convictions on the basis that: (1) the evidence was not sufficient to establish intent to violate the tax laws; (2) the trial court improperly instructed the jury on conscious avoidance; (3) the trial court interfered with the defendants' right to a fair trial by questioning witnesses; and, (4) the Part I judge violated the Speedy Trial Act by extending the time in which to return an indictment. We affirm the judgments of conviction.

BACKGROUND

The Government filed a complaint against Gurary and Nochum Sternberg (Gurary's son-in-law) on April 2, 1986, charging them with one count of conspiracy to defraud the United States in violation of 18 U.S.C. § 371, and three counts of currency reporting violations under 31 U.S.C. §§ 5313 and 5322 in connection with tax returns filed by Irwin Feiner and his companies. Fifteen days later the Government applied for a sixty-day continuance of the time in which to return an indictment or hold a preliminary hearing pursuant to the Speedy Trial Act, 18 U.S.C. § 3161(h)(8)(A). Judge Kevin T. Duffy, sitting in Part I, granted the continuance, finding delay of the preliminary hearing was "indispensable to the interests of justice." This Court rejected defendants' interlocutory appeal from Judge Duffy's order.[1]

On June 18, 1986, a grand jury returned an indictment[2] charging that all three defendants conspired to defraud the United States in violation of 18 U.S.C. § 371; aided and assisted the presentation of false corporate income tax returns in violation of 26 U.S.C. § 7206(2); and aided and assisted the principals of certain corpora-

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[1] 793 F.2d 468 (2d Cir. 1986).

[2] The first Indictment was returned on June 18, 1986, and the first superseding Indictment was filed on November 17, 1986, and a second superseding indictment on May 6, 1987. Trial proceeded under the second superseding indictment, although the government voluntarily dismissed six of the counts on November 19, 1987.

tions in the presentation of false individual income tax returns, in violation of 26 U.S.C. § 7206(2).

At trial, the Government presented evidence indicating that, from 1978 to 1986, Gurary and the Sternbergs sold invoices to corporations, directly and through middlemen, falsely reflecting that one of the defendants' companies had sold goods to the invoice-purchasing company. Principals of those companies would then provide defendants with a company check in payment of the fictitious invoice. Defendants returned cash to the principal, in the amount of the check less a commission of five to fifteen percent for the defendants and their middlemen. No actual goods were involved.

Corporations purchasing the fictitious invoices included the non-existent goods in their calculations of cost-of-goods-sold for tax purposes, fraudulently misstating their taxable income. The principals involved converted part of the cash received to their own personal use without declaring those funds as income on their yearly tax returns. The substantive counts in the indictment relate to the corporate and individual tax returns filed by invoice purchasers and their principals.

DISCUSSION

I. Intent

Defendants contend the evidence presented by the Government was insufficient to support a finding that Gurary and the Sternbergs intended to violate the tax laws. Both the 26 U.S.C. § 7206(2) substantive counts and the 18 U.S.C. § 371 conspiracy count require a showing of specific intent. The specific standards for each, however, vary.

Section 7206(2) provides that:

> Any person who . . . [w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any mat-

> ter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document . . . shall be guilty of a felony. . . .

In the context of this statute, "willfully" means an intentional violation of a known legal duty. *See, e.g., United States v. Bishop*, 412 U.S. 346, 93 S.Ct. 2008, 36 L.Ed.2d 941 (1973); *United States v. Pomponio*, 429 U.S. 10, 97 S.Ct. 22, 50 L.Ed.2d 12 (1976).

The crux of defendants' argument is that the conduct of Gurary and the Sternbergs, however reprehensible, was not directed at the tax laws. More specifically, defendants claim they had no reason to know corporate invoice-purchasers would commit tax fraud, since merchants in the garment industry use both cash and false invoices for purposes other than tax evasion. Instead, defendants contend they believed fictitious invoices were used as a ruse to avoid corporate bookkeepers and bookkeeping procedures which restrict the issuance of checks for cash. Similarly, defendants assert they had no reason to believe corporate principals would pocket cash received and fail to report the money as income on their individual income tax returns.

In considering whether the jury's verdict should be overturned, we must view the evidence and make all permissible inferences in the light most favorable to the Government. *United States v. Carson*, 702 F.2d 351 (2d Cir.), *cert. denied*, 462 U.S. 1108, 103 S.Ct. 2456, 77 L.Ed.2d 1335 (1983); *United States v. Ciambrone*, 787 F.2d 799 (2d Cir.), *cert. denied*, 479 U.S. 1017, 107 S.Ct. 668, 93 L.Ed.2d 720 (1986); *United States v. Heinemann*, 801 F.2d 86 (2d Cir.1986), *cert. denied*, 479 U.S. 1094, 107 S.Ct. 1308, 94 L.Ed.2d 163 (1987). The ques-

tion presented here is whether the Government presented any evidence from which the jury could infer that defendants knew their scheme would result in the filing of false corporate and individual tax returns, and deliberately proceeded with their scheme in the face of that knowledge. We hold the Government presented such evidence.

Evidence presented by the Government tends to show that over an eight-year period defendants sold, directly and through middlemen, fictitious invoices with a face value of over $136 million. For each transaction defendants deducted a fee of five to fifteen percent and split that fee with middlemen. Defendants created and dissolved thirty-six different corporations, opened and closed bank accounts for the processing of checks and funds, yet conducted no substantive business through those corporations—only the sale of invoices. Fictitious invoices were prepared and revised in accordance with purchasers' specifications. Each and every purchaser testifying at trial indicated that they included the fictitious invoices in calculating the deduction for cost-of-goods-sold on their corporate tax returns.

In addition to this indirect evidence, the Government presented direct evidence indicating defendants knew the fictitious invoices were used to prepare fraudulent tax returns and nevertheless proceeded with the scheme. Irving Katcher testified that he had been a middleman in defendants' sales of fictitious invoices. Katcher recounted a conversation where Gurary, in response to a question on why people would want to buy invoices, responded that invoice purchasers could "save money on taxes by building up the inventory, or . . . buy piece goods and get the dollar amount back and use it either to pay off buyers or expand [the purchaser's] business or keep it personally." Tr. 1934. Samuel Mandel, who purchased invoices through his company Randy Hall, Inc., testified that on one occasion Nochum Sternberg

advised Mandel that Gurary wanted to speak with him. At the meeting and in the presence of Nochum Sternberg, Gurary stated that one of Mandel's partners was in trouble with the IRS and inquired whether the partner would tell the IRS where he had been receiving his cash. Employees of another invoice purchaser ("Ahead By a Length" and Irwin Feiner), testified that they instructed Esther Sternberg on correlating checks with invoices and on completing invoices to comport with the type of goods Ahead By a Length purchased in its business.

This undercuts defendants' contentions that they did not know invoices would be used to file false returns or intend to assist in the violation of tax laws. Several factors in particular would allow a jury to infer defendants knew the fictitious invoices were being used as support documentation for fraudulent tax returns and not merely as a ruse to get corporate bookkeepers to issue checks: the length and extent of the scheme; the explanation of uses for fictitious invoices made to Katcher; the meeting between Nochum Sternberg, Gurary and Mandel to discuss the IRS investigation of Mandel's partner; and Esther Sternberg's conversations with invoice purchasers, including the corporate bookkeeper of one purchaser, regarding the descriptions included in the invoices. Defendants' continuation of the scheme in the face of that knowledge is indicative of an intent to aid and assist in the filing of fraudulent corporate tax returns.

The evidence also supports defendants' conviction for aiding and assisting the filing of corporate principals' fraudulent tax returns. Defendants acknowledge that purchasers used fictitious invoices to withdraw cash from their company in instances where established corporate procedures would not allow withdrawal. From this acknowledged purpose and the other evidence presented, a jury could reasonably infer that defendants knew the

principals of invoice purchasers would misappropriate the cash and fail to include it on their taxes.

On the conspiracy count, defendants contest the sufficiency of evidence only on the question of intent, not the agreement and overt-act elements of conspiracy. A conviction for conspiracy under 18 U.S.C. § 371 requires a showing of intent; "conspiracy to commit a particular substantive offense cannot exist without *at least* the degree of criminal intent necessary for the substantive offense itself." *Ingram v. United States*, 360 U.S. 672, 678, 79 S.Ct. 1314, 1319, 3 L.Ed.2d 1503 (1959), quoting *Developments in the Law—Criminal Conspiracy*, 72 Harv.L.Rev. 920, 939 (1959).

The conspiracy count specified the following as illegal objects of the conspiracy: (i) defrauding United States of income taxes and of truthful and accurate information relating to tax liability, by impeding, obstructing and defeating the lawful functions of the IRS in the ascertainment, evaluation, assessment, and collection of taxes and the auditing and review of income tax returns and documentation relating to those returns; (ii) attempting to evade and defeat corporate and personal income taxes of the invoice purchasers and their principals in violation of 26 U.S.C. § 7201; and (iii) aiding and assisting in the filing of false returns. The intent requirement for each object requires separate analysis.

18 U.S.C. § 371 [3] encompasses not only conspiracies that involve loss of Government funds, but also conspiracies for the purpose of impairing, obstructing or defeat-

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[3] 18 U.S.C. § 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

ing the lawful function of any department of Government. *United States v. Johnson*, 383 U.S. 169, 172, 86 S.Ct. 749, 751, 15 L.Ed.2d 681 (1966). Furthermore, intent to defraud the United States may be incidental to another primary motivation or purpose. *United States v. Southland Corp.*, 760 F.2d 1366, 1373 (2d Cir.), *cert. denied*, 474 U.S. 825, 106 S.Ct. 82, 88 L.Ed.2d 67 (1985).

The level of intent required to show a conspiracy to evade taxes in violation of 26 U.S.C. § 7201 [4], or aid and assist the filing of false tax returns in violation of 26 U.S.C. § 7206, is one of willfulness. Defendants must have intentionally violated a known legal duty. *See United States v. Pomponio, supra.*

The Government presented sufficient evidence of intent to support the jury's verdict under 18 U.S.C. § 371. A jury could reasonably infer that defendants intentionally aided the filing of false returns. Similar grounds support the inference that defendants intended to impede or obstruct the IRS from carrying out its functions.

Impeding the IRS, though not defendants' primary purpose, was part and parcel of the scheme. At a minimum, defendants knew the fictitious invoices would be recorded in corporate books and records, records on which corporate tax returns are based. Accurate disclosure of the transactions in corporate records and tax returns would prevent the scheme from working; the corporate bookkeepers and accountants supposedly deceived by the scheme would have to be notified to prevent the filing of false tax returns. The conversation between Gurary and Nochum Sternberg and Mandel regarding the tax difficulties of Mandel's partner indicates defendants were well aware their scheme would prevent or impede the IRS

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[4] 26 U.S.C. § 7201 provides in part:

> Any person who *willfully* attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony . . . (emphasis added).

from learning the source of the cash received by the principals or the exact nature of the financial transaction. The evidence presented supports the reasonableness of the jury's verdict on the conspiracy count.

II. Conscious Avoidance

Defendants also contend the trial judge improperly instructed the jury on conscious avoidance.[5] Their argument that this instruction permitted the jury to convict without finding the necessary knowledge and criminal intent rests on three separate points: (i) a conscious avoid-

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[5] Judge Walker instructed the jury:

> [O]*n the issue of the defendant's knowledge as to whether the invoices and cash would be used to defraud the IRS or accomplish the other tax objects of the conspiracy,* I instruct you that you may consider whether a defendant deliberately closed his or her eyes to what otherwise would have been obvious. Guilty knowledge of the unlawful nature of the conspiracy—if you find one to have existed—cannot be established by demonstrating mere negligence or even foolishness or recklessness on the part of the defendant.
>
> However, it is not necessary that the Government prove that a defendant knew any given fact or facts such as the details of a particular false filing or particular aspects of the tax laws.
>
> Rather, you may find that *a defendant knew the purpose* of the invoice and cash selling operation was to defraud IRS, or evade taxes, or file false returns, or aid and assist the filing of false tax return if you find that -
>
> 1. the defendant you are considering was aware of a high probability that the false invoices or cash would be used for one or more of these unlawful purpose, and
>
> 2. that defendant acted with deliberate disregard of how the invoices or the cash would be used, with a conscious purpose to avoid learning the truth on this subject.
>
> Conscious avoidance may satisfy the requirement of willfulness, unless you find that the defendant you are considering actually believed that the invoices and cash would not be used to defraud the IRS or to violate the tax laws to which I have referred.

ance instruction is inappropriate when the relevant knowledge concerns future conduct of others; (ii) the instruction improperly allowed the jury to find intent based on conscious avoidance; and (iii) the instruction should not have been given because no evidence of conscious avoidance was presented.

Although these arguments might prove telling in other circumstances, they do not require setting aside the convictions in this case. Defendants first claim the instruction impermissibly converted the question of criminal knowledge into a question of foreseeability. Specifically, they assert a conscious avoidance instruction is only appropriate where the crime includes knowledge of an existing fact as an element. Because the requisite knowledge in this case centered on the future conduct of others—i.e., whether invoice purchasers and their principals would file false tax returns—defendants contend the instruction given converted the question of knowledge to one of probability.

Defendants' arguments might hold water if this case involved the sale of invoices on a single occasion. There, the defendants' expectations as to purchaser's conduct might be a question of mere probability or reasonable foreseeability—impermissible standards for imposing criminal liability and imprisonment.

Comments to the Model Penal Code § 2.02(7), from which the conscious avoidance instruction is derived, *see United States v. Jacobs*, 475 F.2d 270 (2d Cir.), *cert. denied sub nom. Lavell v. United States*, 414 U.S. 821, 94 S.Ct. 116, 38 L.Ed.2d 53 (1973), suggest that in general, conscious avoidance instructions are only appropriate where knowledge of an existing fact, and not knowledge of the result of defendant's conduct, is in question. The comment states:

> The Code proposes that the case be viewed as one of acting knowingly when what is involved is a matter of existing fact, but not when what is in-

> volved is the result of the defendant's conduct, necessarily a matter of the future at the time of acting. The position reflects what was believed to be the normal policy of criminal enactments that rest liability on acting "knowingly." The inference of "knowledge" of an existing fact is usually drawn from proof of notice of high probability of its existence, unless the defendant establishes an honest, contrary belief.

Model Penal Code § 2.02(7), comment 9 (1985). Most instances where a defendant might be charged with aiding and abetting or conspiracy for crimes committed by others, for example, providing weapons later used in a bank robbery or providing counterfeit bills later sold by the purchaser to another, involve a single transaction between the defendant and the soon-to-be perpetrator. In those cases, the "proof of the notice of high probability" that the crime will in fact be committed is lacking, so that the inference of knowledge permitted under a conscious avoidance instruction cannot be drawn.

The present case, however, does not involve merely a single transaction, or even transactions affecting a single tax year. Defendants sold fictitious invoices totalling over $136 million, during a period of eight years, to over 200 purchasers. Several purchasers engaged in transactions with defendants over several tax years. All those testifying at trial indicated that fictitious invoices were included in deductions for cost-of-goods-sold on corporate returns, and that principals withdrew cash for personal use without declaring the cash as income. This, combined with the direct evidence of knowledge discussed above, provides sufficient "proof of notice of high probability" that purchasers were committing tax fraud to warrant a conscious avoidance instruction.

Defendants further contend that the conscious avoidance instruction permitted conviction without proof of specific intent to violate the tax laws. Decisions of this

court indicate that in a conspiracy case, a conscious avoidance instruction may be given to show a defendant had some knowledge of the unlawful aims and objectives, but not to establish knowing participation or membership in the scheme charged. *See, e.g., U.S. v. Heinemann*, 801 F.2d at 93-94; *United States v. Lanza*, 790 F.2d 1015 (2d Cir.), *cert. denied*, 479 U.S. 861, 107 S.Ct. 211, 93 L.Ed.2d 141 (1986); *United States v. DiTommaso*, 817 F.2d 201, 218-19 (2d Cir.1987). In the present case, the judge limited his conscious avoidance instruction to whether defendants knew of the illegal object or purpose of the alleged conspiracy.[6]

Finally, defendants' challenge the instruction on the grounds that no evidence of any conscious avoidance by defendants exists. This argument is simply without merit. Their whole defense centers on the notion that despite defendants' awareness that their conduct was probably illegal, they did not know purchasers would use the invoices and cash to commit tax fraud. Defendants' denial of knowledge, combined with the Government's presentation of evidence indicating defendants had notice of the high probability that this was occurring, warranted the conscious avoidance instruction.

III. Trial Judge's Conduct

Defendants object to the trial judge's questioning of witnesses during trial, claiming that it conveyed his hostility to the defendants' theory of the case and biased the jury. In reviewing a claim of judicial misconduct, "we must determine whether the judge's behavior was so prejudicial that it denied [defendants] a fair, as opposed to a perfect trial." *United States v. Pisani*, 773 F.2d 397,

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[6] See note 4. Although the court also mentioned conscious avoidance in connection with willfulness, the components of which are knowledge and intent, a fair reading of that portion of the charge and of the charge as a whole indicates that conscious avoidance was to be used only in connection with the knowledge component.

402 (2d Cir. 1985), citing *United States v. Robinson*, 635 F.2d 981 (2d Cir.1980), *cert. denied*, 451 U.S. 992, 101 S.Ct. 2333, 68 L.Ed.2d 852 (1981). Judge Walker's questioning did not deny defendants a fair trial. This trial was lengthy, and much of the evidence consisted of complicated, technical material. Our review of the transcript further indicates that trade lingo used by many of the witnesses might confuse a lay jury. Most of the Judge Walker's questions merely clarified testimony previously given. Any possible prejudicial effect was cured by the cautionary instruction.[7]

IV. Speedy Trial Act

Defendants also contend their indictment on counts related to tax returns filed by Irwin Feiner and his company violated the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.* Defendants Gurary and Nochum Sternberg were arrested on April 2, 1986, under a complaint charging them with crimes related to Feiner tax returns. Sixteen days later on April 18, 1986, Judge Duffy sitting in Part I granted a 60 day continuance pursuant to 18 U.S.C. § 3161(h)(8), extending the time in which defendants must receive a preliminary hearing or be indicted under the Speedy Trial Act. Pursuant to Rule 3 of the Rules for the Division of Business Among District Judges, Part I is the district court's Part for emergency and miscellaneous matters in civil and criminal cases, and for processing criminal actions and proceedings through the pleading stage. Defendants' appeal of that order was rejected by this court as interlocutory. After defendants filed a motion to dismiss the Feiner counts, but before Judge Walker's denial of that motion, Judge Duffy entered

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[7] Judge Walker charged:

> If you believe the Court has expressed or intimated its opinion on any issue of fact, you should disregard it. Reaching a verdict in this case is exclusively your responsibility. Tr. 3543.

findings of fact supporting his previous order of continuance.

The findings were sealed, filed and docketed on the M-11-189 Docket (the "miscellaneous" docket), as required by the Southern District of New York's standing order controlling docketing and filing of papers containing grand jury material. Standing Order No. 1 (C.J. Brieant, S.D.N.Y. Oct. 16, 1986). The findings appear appropriately on the Court's record; there was no need to modify standard court procedures and add them to the docket kept in defendants' individual names as well.

Defendants challenge the grant of the continuance, and the denial of their motion to dismiss, on the basis that the findings required by 18 U.S.C. § 3161(h)(8) were not made. Defendants' contentions lack merit. Esther Sternberg was arrested after indictment, so that section 3161(b)'s thirty-day time limit does not apply to her. As to Gurary and Nochum Sternberg, we find Judge Duffy's findings on the record sufficient to support a continuance under 18 U.S.C. § 3161(h)(8).[8]

Under the law of this circuit, a court excluding time based on an ends-of-justice continuance under 18 U.S.C. § 3161(h)(8), before granting the continuance, must balance the factors specified in that section; the court need not, however, place the precise reasons on the record at that time. *United States v. Tunnessen*, 763 F.2d 74 (2d Cir.1985); *United States v. Matsushita*, 794 F.2d 46 (2d. Cir.1986). In the present case, the sixty-day continuance was granted prospectively. The record of the hearing on the motion and Judge Duffy's order indicate that he considered submissions from both sides before de-

[8] Defendants also challenge the findings order on the basis they received no notice of its entry. Even if the clerk of the court omitted to send notice of entry of the miscellaneous docket sheet order, that failure does not affect the order's validity. Responsibility for sending notice of entry of the order lies with the clerk of the court and not the United States Attorney.

termining that a continuance best served the ends of justice. The findings supporting the grant of a continuance are sufficiently particularized and amply supported by the record in this case. They state in part:

> Upon the application of the United States, by Assistant United States Attorney David Spears, and based upon the sealed affidavit and sealed *ex parte* affidavit of Assistant United States Attorney Paul E. Summit, both dated April 17, 1986, upon the papers submitted in opposition by Nathin Lewin, Esq., counsel to the defendants, also dated April 17, 1986, and upon argument before this Court on April 18, 1986;
>
> * * * * *
>
> IT IS FURTHER FOUND that the reasons supporting the Court's order of April 18, 1986 were as follows:
>
> (a) delay in the filing of the Indictment was caused because the arrest of the defendants occurred at a time such that it was unreasonable to expect return and filing of the Indictment within the period specified in 18 U.S.C. § 3161(b);
>
> (b) the facts upon which the grand jury was required to base its determination were unusual and complex; and
>
> (c) the reasons set forth in the sealed affidavit and sealed *ex parte* affidavit of Assistant United States Attorney Paul E. Summit, dated April 17, 1987 [sic].

The affidavit referenced in the order [9] explains that just before defendants' arrest Al Mayo, one of the middlemen

[9] Defendants claim that incorporation by reference does not satisfy the Speedy Trial Act's requirement of specific findings justifying exclusion, citing *United States v. Janik*, 723 F.2d 537, 545 (7th Cir. 1983). That court's comment on incorporation by reference, however, pertains to a trial court's attempts to justify

selling invoices, agreed to cooperate with the Government's grand jury investigation. That cooperation both increased the danger that defendants would flee the country and expanded the scope of the grand jury investigation. While the record does not include all the details of how Judge Duffy balanced the need for a continuance against the interests favoring speedy trials, he was constrained somewhat by his need to keep grand jury information secret. In light of those difficulties, we find the record supports the continuance granted.

We have examined the other claims of the defendants and find no merit in them.

AFFIRMED.

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an exclusion under section 3161(h)(8)(A) based on analysis of a separate period. Other circuits, in determining whether a continuance is supported by reasons set forth in the record, have considered both the order of the court and the motions on which the order was based. *See, e.g., United States v. Mitchell,* 723 F.2d 1040 (1st Cir. 1983).

APPENDIX II

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of November one thousand nine hundred and eighty-eight.

Present: Hon. Amalya L. Kearse
Hon. Ellsworth A. VanGraafeiland, Circuit Judges
Hon. Milton Pollack, District Judge,

Docket Nos. 88-1114, 88-1115, 88-1121

UNITED STATES OF AMERICA,
Appellee,

—v.—

SCHNEJER ZALMAN GURARY, NOCHUM STERNBERG and ESTHER STERNBERG,
Defendant-Appellants.

A petition for a rehearing having been filed herein by Appellants NOCHUM AND ESTHER STERNBERG,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

ELAINE B. GOLDSMITH,
Clerk

By: /s/ Fred M. Cassidy
FRED M. CASSIDY
Chief Deputy Clerk

[Filed Nov. 18, 1988]

APPENDIX III

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 30th day of November, one thousand nine hundred and eighty-eight

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Docket Nos. 88-1114, 88-1115, 88-1121

UNITED STATES OF AMERICA,
Appellee,

—v.—

SCHNEJER ZALMAN GURARY, NOCHUM STERNBERG and ESTHER STERNBERG,
Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellants GURARY and STERNBERG.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transferred to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

By: /s/ Fred M. Cassidy
FRED M. CASSIDY
Chief Deputy Clerk

[Filed Nov. 30, 1988]

APPENDIX IV

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M 11-188

UNITED STATES OF AMERICA

—against—

SCHNEJER ZALMAN GURARY and NOCHUM STERNBERG,
Defendants.

New York, N.Y.
April 18, 1986—9:30 a.m.

Before:

HON. KEVIN THOMAS DUFFY,
District Judge.

Appearances:

RUDOLPH W. GIULIANI, ESQ.,
United States Attorney for the
Southern District of New York

By: PAUL E. SUMMIT, ESQ.,
Assistant United States Attorney

MILLER, CASSIDY, LARROCCA & LEWIN, ESQS.,
2555 M. Street, N.W., Suite 500
Washington, D.C. 20037
Attorneys for Defendants

By: NATHAN LEWIN, ESQ., of Counsel

SEALED BY ORDER OF HONORABLE KEVIN THOMAS DUFFY.

[2] MR. SUMMIT: Your Honor, we have moved for a pre-indictment continuance on the grounds that—

THE COURT: You know me better than that. I have read everything.

MR. SUMMIT: May I just highlight a few things.

I received this morning Mr. Lewin's memorandum—or affidavit, I should say, which I understand has been supplied to the Court. I just want to point out a couple of things:

First, Mr. Lewin notes that we did not refer specifically to the factors in the Speedy Trial Act under (h) (8) (B), I believe it is.

I would note at this time that a number of these factors are pertinent.

First, the case is complex, I think, as evidenced by the complaint and by both the sealed affidavit and the sealed ex parte affidavit that have been submitted.

Second, it is a situation in which the arrest was precipitated by a number of factors. Certain of those are spelled out in the ex parte affidavit.

So on both those grounds it seems to the Government that the case falls squarely within the factors specified by Congress for pre-indictment continuances.

This is also a situation in which the Grand Jury's [3] attempts to obtain documents has been frustrated over a long period of time, but I have spelled that out fully in the papers, and unless the Court has any questions, I will rest on the papers.

THE COURT: You have a battle, which you may not recognize, because Paul Summit requested permission to file an ex parte affidavit, so you have to work on that basic assumption.

If I tell you your assumptions are wrong, do I have to go much further with it in the discussion?

MR. LEWIN: Let me say a few things in response to that, your Honor.

One, I know that Mr. Summit has filed ex parte submissions. I would like to state for the record, I know

this is done in the district at various times. I have not found anything in the Speedy Trial Act which authorizes that, and I would request, your Honor, that if there is anything that your Honor would be relying on that appears in an ex parte submission to the Court, that that be disclosed to me so that I have the opportunity to rebutt it.

I object to the submission of an ex parte affidavit. I think it is not authorized by the Speedy Trial Act.

THE COURT: Disclosure of Grand Jury stuff is not authorized by the Speedy Trial Act.

MR. LEWIN: On the other hand, the procedures [4] contemplated by the Speedy Trial Act, specifically 3161, is that the judge has to make a finding that it would serve the interests of justice and so on and that that finding itself be made on a record.

If I don't have an opportunity to respond to it, the Government has filed no public complaint to arrange for the arrest of the individual.

THE COURT: May I ask specifically why the arrest was made? You say it was made three weeks ago.

MR. LEWIN: It was made on April 2nd of 1986.

THE COURT: The Government made everything known on the subpoenaes. Do you mean to say that all of those submissions were done in the name of John Doe?

MR. LEWIN: Richard Roe, to be precise.

The case went up to the Supreme Court being Richard Roe. The courts have had a lot of John Doe cases, so they used a different name.

Nothing has been done until the Government filed its complaint and wanted the defendants arrested.

I object to the submission of ex parte materials and ask that they be produced so I can respond to them.

Secondly, whatever your Honor tells me that my assumptions are erroneous—nonetheless, the fact is that there are two very high standards that have to be met, and in my affidavit, I didn't even refer to the standard in [5] Rule 5C, which says as far as the preliminary hear-

ing, if the defendant does not consent time may be extended only on a showing that extraordinary circumsances exist and a delay is indispensable in the interests of justice, not merely that the Government desires it but that it is indispensable.

The complaint is a detailed complaint. It is not a complaint filed against these individuals which says, "Gee, we caught them with their hands in the cookie jar, and we think there's something else involved."

The complaint can be turned into an indictment forthwith, and they took this complaint—

THE COURT: Let me ask you this: If they turn it into the indictment, would you still be willing on behalf of the corporations to continue to produce books and records?

MR. LEWIN: Yes. The corporations have produced.

THE COURT: No. Answer my question. Don't turn it around. Or would you object, claiming that the Government is using the Grand Jury to prepare its case?

MR. LEWIN: Is your Honor referring to the corporations which have been served with subpoenaes?

THE COURT: Yes.

MR. LEWIN: I can't say what I would do if—

THE COURT: I am not asking you what you would think about knowing there is going to be a superseding indictment. If you see only a superseding indictment and you [6] know the investigation is continuing and your clients will be indicted again, what good does it do you unless what you are intending to do is refuse to turn over books and records claiming that they are preparing the case—

MR. LEWIN: If they are preparing for the case, your Honor, I think they can't use the Grand Jury.

THE COURT: I didn't ask you that question. Assuming that they will produce a much broader indictment with lots and lots and lots of counts, are you willing to take a double bath of publicity?

MR. LEWIN: Yes; of course.

THE COURT: And you are not going to object to subpoenaes calling for books and records of various and sundry entities, with the understanding that these books and records are being used to produce the broader indictment?

MR. LEWIN: No, your Honor. I can't agree to that. To the extent that they are using the Grand Jury to shore up their case, I would object, of course.

For a year and a half the prosecutor has been doing the investigation, and then he says, "I'm going to arrest these people."

I said, "If you arrest, you start the time clock running," and he said, "All right."

He had a choice. These people were in the country. They were here during the entire investigation. [7] Suddenly he says, "I'm going to arrest."

I said, "Its tax time."

He said, "Nonetheless, I am going to arrest."

I said, "All right. Your time clock is running."

Now he wants to get out of it. He says, "I want to be able to have an arrest and hold these people and my time clock should not run, because I have submitted to the Court this affidavit in which I have made this kind of allegation."

I submit the Government has choices. They could continue with the investigation if they thought that there was going to be a substantial indictment and file whatever indictment they thought they could get.

They sat on these things for a year and a half. It is not a question of the corporations producing records of the corporations for which Mr. Gurary was served. Mr. Summit knows there are virtually no records producible pursuant to those subpoenaes. He has gotten from the bank all the banking records of the corporations.

THE COURT: Which suggests that the records of the corporation have been destroyed.

MR. LEWIN: I am telling your Honor, which Mr. Summit knows, the specific corporations were dissolved before the subpoenaes were served, and they had no records other than those produced.

[8] THE COURT: Were the corporate records destroyed?

MR. LEWIN: I think the corporation records were discarded or didn't exist by the time the subpoenaes were served, yes, your Honor, and he will know that. He will know from an accountant who will testify before the Grand Jury. He will know there are no such records and were no such records by the time the subpoenaes were served.

THE COURT: I would hope that the accountant would be able to answer those questions, whether they were destroyed through negligence or intentionally. But that is neither here nor there. The fact of the matter is, does he get the extension, and the answer is yes.

I am telling you right now, to the best of my knowledge and belief it doesn't hurt you unless your clients like to see their names in print, which you are suggesting.

The other way is a double batch of publicity.

I don't care about it. I'm not much for publicity and I drive the people at St. Andrew's Plaza crazy, because I do all kinds of things that they get very annoyed about, but this is one time when I'm going to hold because I think whether it is intentional or not it works out to be fair for the defendants, and under those circumstances I can't say no.

MR. LEWIN: Are they automatically getting the full sixty days, your Honor?

THE COURT: Yes. I would hope that they do it [9] earlier, but it's easier to do it once than a bunch of times.

APPENDIX V

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M11-188

UNITED STATES OF AMERICA

- v -

SCHNEJER ZALMAN GURARY and NOCHUM STERNBERG,
Defendants.

ORDER OF CONTINUANCE

Upon the application of the United States, by Assistant United States Attorney Paul E. Summit, including one sealed affidavit and one sealed *ex parte* affidavit of Paul E. Summit, Esq., and upon the papers submitted in opposition by Nathan Lewin, Esq., counsel to the defendants, it is found that the defendants SCHNEJER ZALMAN GURARY and NOCHUM STERNBERG, were charged in a complaint filed on April 2, 1986, and surrendered to arrest and were released on bail on that day; and

It is further found that granting of such a continuance best serves the ends of justice and outweighs the best interests of the public and the defendant in a speedy trial; and

It is further found that "extraordinary circumstances" exist and that delay of the preliminary hearing is "indispensable to the interests of justice;" and therefore it is

ORDERED that the request for a continuance pursuant to 18 U.S.C. § 3161(h)(8)(A) and Rule 5 of the Federal Rules of Criminal Procedure is hereby granted for a period of sixty (60) days from April 22, 1986; and

IT IS FURTHER ORDERED that this order and the affidavits of Paul E. Summit, Esq., sworn to on April 16, 1986, be sealed until further order of the Court.

Dated: New York, New York
April 18, 1986

SO ORDERED:

/s/ Kevin Thomas Duffy
United States District Judge

APPENDIX VI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M11-189

UNITED STATES OF AMERICA

v.

SCHNEJER ZALMAN GURARY and NOCHUM STERNBERG,
Defendants.

FINDINGS OF FACT SUPPORTING ORDER OF CONTINUANCE OF APRIL 18, 1986

Upon the application of the United States, by Assistant United States Attorney David Spears, and based upon the sealed affidavit and sealed *ex parte* affidavit of Assistant United States Attorney Paul E. Summit, both dated April 17, 1986, upon the papers submitted in opposition by Nathan Lewin, Esq., counsel to the defendants, also dated April 17, 1986, and upon the argument before this Court on April 18, 1986;

IT IS FOUND that the defendants SCHNEJER ZALMAN GURARY and NOCHUM STERNBERG were charged in a complaint filed on April 2, 1986, and surrendered to arrest and were released on bail on that same day;

IT IS FURTHER FOUND that this Court entered an order of continuance pursuant to 18 U.S.C. § 3161(h)(8)(A), dated April 18, 1986, granting the Government's request for a 60-day continuance of the time to indict

the defendants, on the grounds that granting of such continuance best served the ends of justice and outweighed the best interests of the public and the defendants in a speedy trial;

IT IS FURTHER FOUND that the reasons supporting the Court's order of April 18, 1986 were as follows:

(a) delay in the filing of the Indictment was caused because the arrest of the defendants occurred at a time such that it was unreasonable to expect return and filing of the Indictment within the period specified in 18 U.S.C. § 3161(b);

(b) the facts upon which the grand jury was required to base its determination were unusual and complex; and

(c) the reasons set forth in the sealed affidavit and sealed *ex parte* affidavit of Assistant United States Attorney Paul E. Summit, dated April 17, 1987.

DATED: New York, New York
April 14, 1987

SO ORDERED:

/s/ Kevin Thomas Duffy
United States District Judge

APPENDIX VII

COURT'S CHARGE TO THE JURY

* * * *

[3588] On the specific issue of the defendants' knowledge and intent regarding the alleged objects of the conspiracy, I instruct you that if you find that the defendants engaged with invoice purchaser principals in transactions involving large amounts of cash, you may, but need not, infer that the purpose of conducting those transactions in cash was to prevent the creation of records showing the receipt of funds by the invoice purchaser principals, and to conceal the true nature of those transactions from the IRS.

Also on the issue of the defendants' knowledge as to whether the invoices and cash would be used to defraud the IRS or accomplish the other tax objects of the conspiracy, I instruct you that you may consider whether a defendant deliberately closed his or her eyes to what otherwise would have been obvious. Guilty knowledge of the unlawful nature of the conspiracy—if you find one to have existed—cannot be established by demonstrating mere negligence or even foolishness or recklessness on the part of the defendant.

However, it is not necessary that the Government prove that a defendant knew any given fact or facts such as [3589] the details of a particular false filing or particular aspects of the tax laws.

Rather, you may find that a defendant knew the purpose of the invoice and cash selling operation was to defraud IRS, or evade taxes, or file false returns, or aid and assist the filing of false tax returns if you find that

1. the defendant you are considering was aware of a high probability that the false invoices or cash would be used for one or more of these unlawful purposes, and

2. that defendant acted with deliberate disregard of how the invoices or the cash would be used, with a conscious purpose to avoid learning the truth on this subject.

Conscious avoidance may satisfy the requirement of willfulness, unless you find that the defendant you are considering actually believed that the invoices and cash would not be used to defraud the IRS or to violate the tax laws to which I have referred.

* * * *

APPENDIX VIII

COURT'S CHARGE TO THE JURY

* * * *

[3609] On the issue of defendants' knowledge and intent on the 44 substantive counts, I instruct you again that you may consider whether a defendant deliberately closed his or her eyes to what otherwise would have been obvious. Guilty knowledge of the use to which invoices and the cash would be put cannot be established by demonstrating recklessness, [3610] mere negligence or even foolishness on the part of a defendant. However, it is not necessary that the Government prove that a defendant knew any given fact or detail of the false filing, or particular aspects of the law about aiding or assisting the filing of a false return.

Rather you may find that a defendant knew that the invoices and/or cash would be used to prepare or file false corporate and/or individual tax returns if you find that (1) the defendant you are considering was aware of a high probability that the false invoices or the cash would be used to prepare or file false tax returns, and (2) that defendant acted with deliberate disregard for how the invoices and/or the cash would be used, with a conscious purpose to avoid learning the truth on this subject. Conscious avoidance may satisfy the requirement of willfulness, unless you find that the defendant you are considering actually believed that the invoices and cash would not be used to prepare or file false tax returns.

* * * *

APPENDIX IX

STATUTES

United States Code, Title 18, §§ 3161, 3162

§ 3161. Time limits and exclusions

* * * *

(b) An information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

* * * *

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

* * * *

(8) (A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance

outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

* * * *

§ 3162. Sanctions

(a)(1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

* * * *

(2)

Supreme Court, U.S.
FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1252

In the Supreme Court of the United States

OCTOBER TERM, 1988

SCHNEJER Z. GURARY, NOCHUM STERNBERG, AND ESTHER STERNBERG, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
JAMES I.K. KNAPP
Acting Assistant Attorney General
ROBERT E. LINDSAY
GAIL BRODFUEHRER
Attorneys

Department of Justice
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20pp

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to prove that petitioners intended to violate the tax laws.

2. Whether the district court properly gave the jury a "conscious avoidance" instruction.

3. Whether the district court complied with the requirement of the Speedy Trial Act, 18 U.S.C. 3161(h)(8)(A), that the court set forth its reasons for granting an "ends of justice" continuance.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1252

SCHNEJER Z. GURARY, NOCHUM STERNBERG, AND ESTHER STERNBERG, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 860 F.2d 521.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1988. Petitions for rehearing were denied on November 18 and November 30, 1988, respectively. Pet. App. 17a, 18a. The petition for a writ of certiorari was filed on January 30, 1989 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted on one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371, and on 44 counts of aiding and abetting the filing of false corporate and personal income tax returns, in violation of 26 U.S.C. 7206(2). Petitioner Gurary was sentenced to a three-year term of imprisonment, five years' probation to begin upon his release, and fines of $2 million. Petitioner Nochum Sternberg was sentenced to 18 months' imprisonment, five years' probation, and fines of $1 million. Petitioner Esther Sternberg was sentenced to 120 days' imprisonment and a five-year term of probation. She was also held jointly and severally liable for the fines imposed on Nochum Sternberg.

1. The evidence at trial is summarized in the court of appeals' opinion, Pet. App. 3a, 5a-8a, and in the government's brief in the court of appeals, Gov't C.A. Br. 3-35. It showed that from 1978 to 1986 petitioners created and controlled approximately 36 companies that purported to be engaged in the sale of textiles, gems and other merchandise to legitimate businesses. In fact, petitioners sold sham invoices to the principals of other businesses (the "invoice-purchasing companies"). Each sham invoice falsely reflected that one of petitioners' companies had sold goods to an invoice-purchasing company. The principals of the invoice-purchasing company would then provide petitioners with a check drawn on their company and payable to petitioners' company. Petitioners would then give the principals cash or bonds in the amount of the check less a "commission" of 5 to 15 percent, which petitioners retained. The invoice supplied by petitioners falsely stated that petitioners' company had sold goods in the amount of the check received, but in fact the invoice-purchasing com-

pany did not receive and had no expectation of receiving any goods from petitioners' company. The invoice purchasers would then record the sham invoices in its books and records as a legitimate purchase of goods. Petitioners deposited the checks received from the invoice purchasers in bank accounts held in the names of petitioners' individual companies. Gov't C.A. Br. 4-5.

The tax consequences of petitioners' scheme were twofold. First, the purchases reflected on the false-invoices were recorded on the invoice-purchasing company's federal income tax returns for the relevant fiscal year as part of the cost of goods sold and the cost of merchandise bought for manfacture and sale by the companies. Thus, the amounts on petitioners' sham company invoices were fraudulently deducted from the amounts of the invoice-purchasing company's gross receipts for the fiscal year, thereby reducing the company's tax liabilities. Second, the principals of the invoice-purchasing companies kept for themselves all or a substantial portion of the cash they received from the defendants, and they failed to report those cash receipts on their individual income tax returns. Gov't C.A. Br. 5-6.

Petitioner Gurary was the mastermind in the scheme, exerting authority and control over petitioners' companies and everyone associated with them. He set the amounts of the commissions paid by the invoice-purchasing companies, and he recruited and supervised two individuals who sold phony invoices for petitioners' companies. Nochum Sternberg was the salesman and delivery man. He arranged the details of transactions with particular invoice purchasers, including the amount of the invoices and cash to be purchased, and the method and time of delivery of the invoices and cash. Esther Sternberg acted as the bookkeeper for petitioners' companies. She created the invoices, she dealt with bookkeepers of the invoice-purchas-

ing companies regarding the delivery of invoices and their contents, she dealt with bank employees with regard to petitioners' company bank accounts, and she kept track of expenses incurred in connection with the scheme. On occasion, she also arranged the details of the transactions with particular invoice purchasers. Gov't C.A. Br. 6.

In their defense, petitioners argued that they did not intend to violate the tax laws. Petitioners asserted that they had no reason to know that the invoice-purchasing companies were using the fictitious invoices to file fraudulent returns, or that the corporate principals were misappropriating the cash and failing to report it as income. Pet. App. 4a.

2. The court of appeals affirmed. Pet. App. 1a-16a. With respect to the sufficiency of the evidence, the court of appeals held that the government presented evidence "from which the jury could infer that [petitioners] knew their scheme would result in the filing of false corporate and individual tax returns, and deliberately proceeded with their scheme in the face of that knowledge." *Id.* at 5a. The court of appeals also held that the trial judge properly gave the jury an instruction on "conscious avoidance." *Id.* at 11a-12a. Finally, the court of appeals rejected petitioners' claim that the trial judge violated the Speedy Trial Act, 18 U.S.C. 3161(h)(8)(A), by granting an "ends of justice" continuance without setting forth with sufficient particularity his reasons for doing so. Pet. App. 13a-16a.

ARGUMENT

1. Petitioners argue (Pet. 9-13) that the evidence was insufficient to establish their intent to violate the tax laws and that their convictions under 26 U.S.C. 7206(2) must

therefore be set aside.[1] Sufficiency of the evidence claims generally are for the courts of appeals, not this Court, to resolve, see *Hamling* v. *United States*, 418 U.S. 87, 124 (1974), but in any event the court of appeals correctly rejected petitioners' argument. The government introduced ample evidence, both direct and circumstantial, from which the jury was entitled to infer that petitioners had supplied the fictitious invoices to buyers with the understanding that the buyers would use the invoices to prepare fraudulent tax returns.

Over an eight-year period, petitioners sold a total of more than $136 million in fictitious invoices and charged a fee for that service. The invoices were sold through 36 different corporations created by petitioners, and those corporations conducted no business other than selling invoices and providing cash for a commission. Petitioners prepared the invoices in accordance with each purchaser's specifications, and each purchaser who testified at trial indicated that the fictitious invoices were used to calculate the "cost-of-goods-sold on their corporate tax returns." Pet. App. 5a. To avoid detection of their scheme, petitioners did not use their own names in forming the companies, and the companies were created and dissolved on a rotating basis. Tr. 722, 725, 1568, 1805-1806, 2814-2819; GX 3000.[2] The tax returns filed for petitioners' companies falsely indicated that the companies were in the "wholesale trade, durable goods" business. Tr. 2909-2910. Petitioners also opened a total of 55 bank accounts, each of which was active for one to two-and-one-half years. Tr.

[1] Petitioners have apparently abandoned their claim, raised in the court of appeals, that the evidence was insufficient to establish their intent to defraud the United States under 18 U.S.C. 371. See Pet. (I), 12-13.

[2] The citations to the record are taken from the government's brief in the court of appeals.

2812-2813, 2819; GX 801. The bulk of disbursements for each bank account were in the form of an official check or bank check drawn on the company account and payable to a Swiss bank account. Tr. 2856-2865; GX 300H, 400H, 600H.

In addition to this circumstantial evidence, there was also direct evidence of petitioners' knowledge and intent. One witness, a middleman in petitioners' sales of fictitious invoices, recounted a conversation in which petitioner Gurary explained why people would want to buy such invoices. Gurary stated that "invoice purchasers could 'save money on taxes by building up the inventory, or . . . buy piece goods and get the dollar amount back and use it either to pay off buyers or expand [the purchaser's] business or keep it personally.' " Pet. App. 5a, quoting Tr. 1934. Petitioner Gurary's statement that an invoice purchaser could save on taxes by building up inventory demonstrates an awareness that the invoices were being used to evade taxes. Similarly, from Gurary's statement that the invoice purchaser could "keep [the cash] personally" and from the other evidence presented the jury could reasonably infer that Gurary knew that corporate officers were misappropriating the cash and failing to include it on their personal returns.

Another witness, a purchaser of the fictitious invoices, testified that petitioner Nochum Sternberg called him to a meeting with Gurary. At the meeting, Gurary noted in Sternberg's presence that one of the witness's partners was in trouble with the Internal Revenue Service. Gurary questioned the witness as to whether his partner intended to disclose to the IRS the source of his cash. Pet. App. 5a-6a. That evidence provides a firm basis for the jury to infer that Gurary and Sternberg were aware that their actions violated the tax laws.

In addition, several employees of a different invoice purchaser testified that they instructed petitioner Esther

Sternberg on various matters relating to the invoices, including the correlation of checks with invoices and the completion of the fictitious invoices to ensure that the goods listed on the invoices comported with the type of goods regularly purchased by the company. Pet. App. 6a. Esther Sternberg had "hundreds" of conversations with the middlemen regarding the invoices, Tr. 743-744, 1945-1946, and both Nochum and Esther Sternberg knew that the phony invoices were recorded in the accounting books of the corporations that had purchased them, Tr. 1015, 1406, 1640, 1687-1688. That evidence amply supports an inference that the Sternbergs knew they were aiding in tax evasion. Finally, petitioners' knowledge and intent could also be inferred from the fact that they offered to sell fraudulent charitable deductions to individuals by providing fictitious receipts in return for cash in the amount of 90 percent of the face value of the receipts. Tr. 726, 728-730, 1961, 2359-2360.

The cases on which petitioners rely in challenging the sufficiency of the evidence are completely inapposite. In *Ingram* v. *United States*, 360 U.S. 672 (1959), this Court reversed the conspiracy convictions of two employees of an illegal gambling operation because they lacked personal knowledge of the tax liability of the entrepreneurs of the operation and were unaware that they were helping the persons in charge of the operation to evade the payment of taxes. 360 U.S. at 678-679. Here, by contrast, there was ample evidence from which the jury could reasonably infer that petitioners supplied documents to other companies with knowledge that the documents would be used to prepare false returns.[3]

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[3] For the same reason, petitioners' reliance on *United States* v. *Williams*, 809 F.2d 1072, 1095 (5th Cir.), cert. denied, 108 S. Ct. 228 (1987), is unavailing.

Similarly, in *United States* v. *Falcone*, 311 U.S. 205 (1940), unlike in this case, there was no evidence that the defendants contemplated a violation of the law. The defendants in *Falcone* were wholesale suppliers of sugar. On the basis of evidence that they sold sugar to the operators of illegal stills, the defendants were convicted of conspiring to operate the stills. This Court reversed on the ground that, even assuming the defendants knew of the use being made of the sugar, their knowledge was insufficient to support their convictions, because "[t]he evidence respecting the volume of sales * * * is too vague and inconclusive" to show that the defendants knew of the bootlegging conspiracy. 311 U.S. at 210. This case is different from *Falcone* for the simple reason that the *Falcone* defendants were selling an ordinary household item, whereas petitioners were engaged in the sale of fictitious invoices and the provision of large amounts of unrecorded cash. The act of supplying these items supports the inference, which was also supported by other evidence in the record, that the suppliers expected the purchasers to use the items to file fraudulent returns. As this Court later noted in *Direct Sales Co.* v. *United States*, 319 U.S. 703, 710 (1943), "[a]ll articles of commerce may be put to illegal ends[,] [b]ut all do not have inherently the same susceptibility to harmful and illegal use." Rather, different items, "from their very nature," embody different capacities for giving the seller notice that the purchaser will use them unlawfully. *Ibid.* Here, it is difficult to imagine any purpose for the fictitious invoices other than to provide the basis for fraudulent tax returns. Petitioners, therefore, are not in the same position as the defendants in *Falcone*.

Nor does the decision of the court of appeals "extend[] the criminal tax laws far beyond their intended scope," as petitioners assert (Pet. 10). To the contrary, the decision below is consistent with a well-established line of cases holding that, to prove that defendants aided and assisted

the preparation of fraudulent tax returns, the government need only demonstrate that the defendants intentionally engaged in conduct that they knew would result in the filing of a false return. See, *e.g.*, *United States* v. *Nealy*, 729 F.2d 961, 962-963 (4th Cir. 1984) (defendant supervised the production of a fraudulent engineering report that was included in memoranda distributed to potential investors in a coal tax shelter); *United States* v. *Kopituk*, 690 F.2d 1289, 1333 (11th Cir. 1982), cert. denied, 463 U.S. 1209 (1983) (defendants compiled records indicating that amounts actually constituting illegal payoffs to union officials were legitimate business expenses, and records were used by accountants in preparing corporate returns); *United States* v. *Wolfson*, 573 F.2d 216, 224-225 (5th Cir. 1978) (defendant prepared inflated appraisals, which taxpayers subsequently used to claim charitable deductions); *United States* v. *Perez*, 565 F.2d 1227, 1233-1234 (2d Cir. 1977) (defendant submitted form falsely indicating that he held winning ticket, and racetrack used form to report winnings to IRS); *United States* v. *Crum*, 529 F.2d 1380, 1382 (9th Cir. 1976) (defendant provided backdated beaver purchase contracts, which taxpayers subsequently used to claim fraudulent depreciation deductions); *United States* v. *Maistrow*, 451 F.2d 1342 (2d Cir. 1971) (defendants who held winning tickets at racetrack procured services of another person to complete false verification form used by racetrack in reporting winnings to IRS).[4]

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[4] Petitioners contend (Pet. 10) that the court of appeals' decision is the first to "extend[] the reach of 26 U.S.C. 7206(2) beyond individuals who participate in the preparation of a tax return or provide documents explicitly designed for use in connection with a tax return." That contention ignores the purpose served by the fictitious invoices that petitioners marketed. The invoices provided by petitioners were

2. Petitioners also contend (Pet. 13-16) that the trial judge erroneously charged the jury by giving a "conscious avoidance" instruction. They allege that the instruction in this case impermissibly asked the jury to infer knowledge of illegal conduct that would occur only in the future. The court of appeals properly rejected that claim, ruling that, on the facts of this case, the "conscious avoidance" charge was appropriate.

As the court of appeals explained, petitioners' argument ignores the fact that petitioners had been selling false invoices and cash since at least 1978. Pet. App. 10a-11a. Thus, while the trial judge's instruction referred to petitioners' closing their eyes to "the use to which invoices and the cash would be put," Tr. 3609, that reference was to ongoing conduct by the invoice purchasers, contemporaneous with petitioners' sales of the invoices. What petitioners may have consciously avoided learning was that the invoices and cash were being used every day over an eight-year period by each invoice purchaser to take fraudulent deductions and obtain tax-free income. The "conscious avoidance" charge thus related to knowledge of a present fact, not the possibility of future events.[5]

"designed for use in connection with a tax return" to the same degree as the documents supporting the convictions in the cases listed above. In fact, petitioners' involvement in their customers' tax evasion was even greater than in many of the cited cases. In those cases, the defendants often simply provided documents to aid in tax fraud. In this case, by contrast, petitioners did more than assist in their customers' fraud; in essence, they promoted the fraud by marketing a device whose only use was to provide the false appearance of legitimate expenditures and to generate untraceable cash.

[5] In any event, it is not clear why a "conscious avoidance" charge should be more suspect when applied to knowledge of future plans than when applied to matters occurring in the present or the past. A person who supplies a getaway car to a bank robber, but willfully avoids learning of the robbery, is equally culpable whether he provides the car as the robbers enter the bank or as they leave.

Petitioners contend (Pet. 15-16) that there was no evidence that they deliberately avoided learning that their customers either used the fictitious invoices to support fraudulent deductions on their corporate tax returns or failed to report the cash as income on their individual tax returns. They assert, therefore, that there was no basis for the "conscious avoidance" charge in this case. But petitioners' entire defense was based on the theory that, although they knew their conduct was illegal, they did not realize they were assisting the preparation of fraudulent tax returns. In view of petitioners' defense, and in light of the government's evidence that it was highly probable petitioners knew of the use to which the invoices were being put, the jury was entitled to conclude that if petitioners were not aware of the illegal tax aspects of their scheme, it was only because they deliberately chose to avoid gaining that knowledge. Under those circumstances, a conscious avoidance instruction was appropriate. See, *e.g.*, *United States* v. *Peddle,* 821 F.2d 1521, 1524-1525 (11th Cir. 1987); *United States* v. *McAllister,* 747 F.2d 1273, 1275-1276 (9th Cir. 1984), cert. denied, 474 U.S. 829 (1985); *United States* v. *Holloway,* 731 F.2d 378, 380-381, after remand, 740 F.2d 1373 (6th Cir.), cert. denied, 469 U.S. 1021 (1984); *United States* v. *Glick,* 710 F.2d 639, 642 (10th Cir. 1983), cert. denied, 465 U.S. 1005 (1984); *United States* v. *Mohabir,* 624 F.2d 1140, 1154 (2d Cir. 1980).[6]

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[6] Only one of the cases cited by petitioners held that it was error (albeit harmless) to use a conscious avoidance instruction. The facts of that case, which involved the smuggling of narcotics into this country from abroad on one occasion, differed markedly from this one. *United States* v. *Alvarado,* 838 F.2d 311, 312-313, 314-316 (9th Cir.) (error to give a conscious avoidance instruction when all of the evidence pointed towards actual knowledge by the defendants that a suitcase held cocaine), cert. denied, 108 S. Ct. 2880 (1988).

3. Petitioners urge this Court (Pet. 16-18) to reverse their convictions on the ground that the district court violated the Speedy Trial Act, 18 U.S.C. 3161-3174, by granting the government's request for a pre-indictment 60-day "ends-of-justice" continuance without adequately setting forth the reasons for the continuance.[7] The court of appeals found no error, and its decision was correct.

Petitioners Gurary and Nochum Sternberg were arrested on April 2, 1986. Pet. App. 13a. On April 17, the government requested a 60-day extension of time to return an indictment and hold a preliminary hearing. C.A. App. 58-65. In support of the motion for a continuance, the government submitted sealed affidavits explaining the charges in the complaint and setting forth in detail the reasons why the government was seeking the extension. Pet. App. 15a-16a. The affidavits set forth the following facts: The government had received information indicating that petitioners would flee the jurisdiction, information that required the immediate arrest of two of the petitioners;[8] petitioners' scheme was highly complex, and

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[7] Because petitioner Esther Sternberg was arrested after the indictment was returned, the Section 3161(b) time limit does not apply to her. Pet. App. 14a.

[8] Among the circumstances giving rise to the government's concern that petitioners might flee, as set forth in the government's sealed affidavit, were the following: First, in October 1985 one of the middlemen in petitioners' scheme pleaded guilty and began cooperating with the government. He informed the government that petitioner Gurary had once suggested to him that he should leave the country in order to avoid a related fraud investigation. Second, an analysis of bank records received pursuant to grand jury subpoena revealed that petitioners' companies had transferred approximately $30 million to Swiss bank accounts from 1975 to 1985. Third, in negotiations conducted with petitioners' counsel prior to the government's decision to arrest petitioners, the government requested the voluntary surrender of petitioners' passports to the government. Petitioners declined.

the government anticipated bringing charges more extensive than the ones that were listed in the complaint;[9] and petitioner Gurary's recalcitrance in complying with grand jury subpoenas issued 18 months earlier had delayed the grand jury's investigation. Pet. App. 15a-16a; C.A. App. 58-65, 201-204; Gov't C.A. Br. 127-131.

After reviewing submissions from the parties and hearing oral argument, the district court granted the government's request for a continuance. The court found that the "granting of such a continuance best serves the ends of justice and outweighs the best interests of the public and the defendant in a speedy trial." The court further found that " 'extraordinary circumstances' " exist, and that delaying the preliminary hearing was " 'indispensable to the interests of justice.' " Pet. App. 25a-26a.[10] On June 18, 1986, the grand jury returned a 35-count indictment against petitioners. C.A. App. 110-129. A superseding indictment was filed on November 17, charging additional counts. C.A. App. 87-109. On January 16, 1987, peti-

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Fourth, another middleman in petitioners' scheme informed the United States Attorney's Office that petitioner Gurary had told the middleman in substance that he would flee if the investigation became "too hot." Gov't C.A. Br. 127-129.

[9] The complaint set forth a complex series of transactions involving at least 170 companies engaged in a variety of industries in the New York area whose checks in excess of $150 million had been deposited in petitioners' company bank accounts. One middleman had also been cooperating with the government, and he had engaged in numerous taped telephone conversations with false-invoice purchasers whom he referred to petitioners for false-invoice transactions. Many of those conversations implicated petitioners, and could therefore have served as the basis for new charges against them and against other defendants as well. Gov't C.A. Br. 130-131.

[10] Petitioner Gurary appealed the order, but the appeal was dismissed as interlocutory. *United States* v. *Gurary*, 793 F.2d 468 (2d Cir. 1986).

tioners moved for dismissal of certain counts contained in the superseding indictments, claiming that the district court had failed to set forth particular reasons for granting the continuance. Three months later, on April 14, 1987, the district court entered an order setting forth additional findings supporting its earlier order. Pet. App. 27a-28a.[11]

Petitioners contend (Pet. 17) that the findings set forth in the district court's April 14, 1987, order are not sufficiently particularized because they "merely tracked some of the statutory language, without identifying a single fact from this case that justified the delay." That contention is meritless. The April 14 order specifically noted that the case was "unusual" and "complex" and that "the arrest of the defendants occurred at a time such that it was unreasonable to expect return and filing of the Indictment within the period specified in 18 U.S.C. 3161(b)." Pet. App. 28a. In addition, the order incorporated the government's ex parte affidavit, which indicted that there was a well-founded concern that petitioners might flee, a concern that prompted the immediate arrests of petitioners Gurary and Nochum Sternberg. Pet. App. 15a-16a. That affidavit also indicated that Gurary's own conduct had frustrated the grand jury's investigation. C.A. App. 77-78. Those facts were clearly sufficient to satisfy the re-

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[11] Every court of appeals that has considered the question has held that a district court need not set forth the precise reasons for its decision at the time a continuance is granted and may issue its explanation later. *United States* v. *Tunnessen,* 763 F.2d 74, 78-79 (2d Cir. 1985); *United States* v. *Wiehoff,* 748 F.2d 1158, 1160 (7th Cir. 1984); *United States* v. *Bryant,* 726 F.2d 510, 511-512 (9th Cir. 1984); *United States* v. *Brooks,* 697 F.2d 517, 522 (3d Cir. 1982), cert. denied, 460 U.S. 1073 (1983); *United States* v. *Clifford,* 664 F.2d 1090, 1095 (8th Cir. 1981); *United States* v. *Edwards,* 627 F.2d 460, 461 (D.C. Cir.), cert. denied, 449 U.S. 872 (1980).

quirements of 18 U.S.C. 3161(h)(8)(A).[12]

Petitioners' reliance on *United States* v. *Perez-Reveles,* 715 F.2d 1348 (9th Cir. 1983), is misplaced. In that case, the district court granted the defendant's request for a continuance without making any findings whatsoever. When the defendant later moved to dismiss the indictment for a violation of the Speedy Trial Act, the district court denied the motion to dismiss " 'because of the complexity of the trial and also the settlement pending.' " 715 F.2d at 1352 (quoting district court's order). The Ninth Circuit reversed. It held that the pendency of plea negotiations is not a factor that permits an exclusion of time under Section 3161(h)(8)(B), and that the district court had erred in finding that the case was complex. 715 F.2d at 1352-1353. By contrast, in this case the district court's finding that the case was complex was only one of the factors set forth in support of its order. Moreover, unlike *Perez-Reveles,* which involved a single defendant who was charged with a simple violation of the narcotics laws that resulted in a two-day trial, the extensive record in this six-week trial amply supports the district court's finding that this prosecution was complex.[13]

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[12] To the extent that petitioners argue that the district court was not entitled to base its findings on affidavits that the court incorporated by reference, petitioners' argument is not supported by the case law. See, *e.g., United States* v. *Mitchell,* 723 F.2d 1040, 1044 (1st Cir. 1983); *United States* v. *Guerrero,* 667 F.2d 862, 866-867 (10th Cir. 1981), cert. denied, 456 U.S. 964 (1982). Petitioners cite no case holding to the contrary.

[13] The remaining cases cited by petitioners do not support their claim that the district court failed to set forth its findings with sufficient particularity. In each case, the court of appeals rejected the defendant's claims that the lower court's findings were insufficient. *United States* v. *Wiehoff,* 748 F.2d 1158, 1160 (7th Cir. 1984); *United States* v. *Bryant,* 726 F.2d 510, 511-512 (9th Cir. 1984); *United States* v. *Brooks,* 697 F.2d 517, 521-522 (3d Cir. 1982), cert. denied, 460 U.S. 1073 (1983).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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MARCH 1989

U.S. GOVERNMENT PRINTING OFFICE 1989—241 699 00180